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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MATT HOOVER,

Plaintiff and Appellant,

v.

THOMAS E. WALLEY,

Defendant and Respondent.

G050018

(Super. Ct. No. 30-2011-00529475)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Ronald L. Bauer, Judge. Affirmed.

Stobart Law Firm, John E. Stobart; and Matt Hoover, in pro. per., for Plaintiff and Appellant.

Sedgwick, Curtis D. Parvin and Deborah L. O'Connor for Defendant and Respondent.

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Defendant and respondent Thomas E. Walley, an attorney, formerly represented plaintiff and appellant Matt Hoover and Sarah Martin (Martin) in real estate litigation. When plaintiff and Martin had a falling out, defendant ceased his relationship with plaintiff but continued to represent Martin for a period. This led to multiple actions between and among the parties, including a suit by plaintiff against Martin.

In the case before us, plaintiff complains defendant breached his fiduciary duty to him by referring Martin to an attorney to defend her in plaintiff's case against her and allegedly paying Martin's attorney fees in that suit.

The court granted summary judgment in favor of defendant. Plaintiff claims this was error because defendant did not meet his burden to show plaintiff had no evidence to substantiate his claim; plaintiff provided sufficient evidence to show a triable issue of material fact as to defendant's alleged breach; and the court should have granted plaintiff a continuance for discovery purposes.

We conclude defendant met his initial burden to show plaintiff cannot prove his case and the burden shifted to plaintiff; plaintiff did not present evidence sufficient to show a triable issue of material fact; and the court did not abuse its discretion by denying a further continuance. Consequently, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

To properly understand this case it is necessary to outline in some detail the cases underlying the instant litigation.<sup>1</sup>

For a little over a year, between June 2005 and September 2006, defendant, a lawyer with the firm of Good, Wildman, Hegness & Walley, represented plaintiff, Martin, plaintiff's then girlfriend, and Martin's business, Footprints 'N More

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<sup>1</sup> California Rules of Court rule 8.204 (a)(2)(C) required plaintiff to "[p]rovide a summary of the significant facts" in his opening brief rather than merely evidence favorable to his position. He failed to do so but instead included only those facts favorable to his position. We could consider his arguments forfeited. (*Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 53.)

(Footprints), in a landlord-tenant action (Landlord Suit). In 2006, after Martin and defendant had severed their relationship, the attorney-client relationship between plaintiff and defendant terminated and defendant has never represented plaintiff since then. Defendant continued to represent Martin until just before the Landlord Suit was settled.

In March 2007 plaintiff sued Martin for breach of contract and common counts, alleging she owed him money in connection with the Footprints business, including a claim he was to receive a percentage of Footprints if he paid a portion of the attorney fees in the Landlord Suit (Hoover v. Martin). When Martin asked defendant to represent her, he advised her he could not and gave her names of at least three attorneys, including Steven H. Gentry (Gentry) from the firm of Berger Kahn (Berger Khan), whom Martin ultimately retained as her lawyer.

Gentry filed a cross-complaint on behalf of Martin against plaintiff for breach of contract and tort claims. It alleged, among other things, plaintiff did not pay his agreed share of litigation expenses in the Landlord Suit.

After a bench trial the court entered judgment in Martin's favor on the complaint and in plaintiff's favor on the cross-complaint. As the court noted, neither party prevailed.

In September 2007 plaintiff filed an arbitration action (Arbitration)<sup>2</sup> against defendant and Berger Kahn for fraud, breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith and fair dealing, and malpractice arising out of defendant's representation of plaintiff in the Landlord Suit. Gentry represented defendant.

Plaintiff prevailed on the breach of fiduciary duty, breach of the covenant of good faith and fair dealing, and malpractice claims. Defendant was ordered to pay him more than \$200,000, including just over \$150,200 for attorney fees in the arbitration and

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<sup>2</sup> This was pursuant to a provision in the retainer agreement for the Landlord Suit providing for arbitration of a dispute regarding legal services.

disgorgement of more than \$36,000 in fees plaintiff had paid to defendant in the Landlord Suit.

A State Bar action was initiated against defendant arising out of his representation of Martin and defendant in the Landlord Suit. The State Bar found defendant had a conflict of interest when he represented both of them without obtaining informed written consent, and breached his fiduciary duty to plaintiff when he continued to represent Martin in that action after his representation of plaintiff had terminated.

In 2009 plaintiff sued Martin, Gentry, Berger Kahn, and defendant for, among other things, malicious prosecution based on Martin's cross-complaint in *Hoover v. Martin*. Plaintiff claimed defendant was the "man behind the scenes" or the "driving force" for the cross-complaint and had paid Martin's attorney fees. The court dismissed defendant from the action by granting his anti-SLAPP motion. This court affirmed that ruling. (*Hoover v. Walley* (Nov. 9, 2010, G042813) [nonpub. opn.] )

In 2010 plaintiff filed a complaint against defendant and his law firm for breach of fiduciary duty, making identical allegations as in this action. Shortly thereafter, a felony criminal complaint was filed against plaintiff for threatening to kill defendant. A jury convicted him of making criminal threats. Plaintiff did not serve the 2010 case because he thought the criminal action might cause "trouble" in the action.

In 2011 plaintiff, in propria persona, filed this action for breach of fiduciary duty, using a form complaint. His sole claim was defendant "breached his fiduciary duty of loyalty and confidentiality to me by acting adverse [*sic*] to me in a matter in which he previously represented me in [*sic*]. Because of his intentional malicious acts against me, I suffered extreme damage that I would not have otherwise suffered. I believe and based thereon herein allege that defendants<sup>3</sup> were the main driving force behind a third parties

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<sup>3</sup> Plaintiff did not name the law firm in the caption but included it in the allegation of wrongdoing.

[sic] litigation against me [i.e., Martin's cross-complaint against plaintiff]. The third party litigation was directly related to matters that defendants previously represented me in [Landlord Suit]."

In September 2012 defendant filed a motion for summary judgment, with the hearing set in December, one month before the scheduled January 2013 trial date. Defendant argued he had a complete defense to the claims because he had never paid Martin's attorney fees, and, as a result, plaintiff neither had nor could obtain sufficient evidence to prove his claim. Defendant further contended plaintiff conceded at his deposition he had no evidence on which to base his claim.

The motion was supported by three declarations.<sup>4</sup> In his declaration, defendant stated that although he had represented Martin in the Landlord Suit in the mid-2000's, and plaintiff in connection with that lawsuit beginning in June 2005, he stopped representing plaintiff in September 2006. Since that time defendant never represented plaintiff again.

Defendant also declared that as to Hoover v. Martin he: (1) did not breach any fiduciary duties to plaintiff; (2) never breached any duty of loyalty or duty to maintain confidential information he received from plaintiff in the Landlord Suit; (3) never took any adverse action toward plaintiff; (4) never paid any of Martin's legal fees to Berger Kahn or Gentry, either directly or indirectly; and (5) never gave or loaned money to Martin or Footprints to pay attorney fees to Berger Kahn or Gentry or for any purpose.

In addition, regarding Hoover v. Martin, defendant declared no attorney from defendant's firm: (1) represented or gave legal advice to any party; (2) prepared,

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<sup>4</sup> A fourth declaration authenticated documents produced as exhibits, including copies of various pleadings from the other cases, the order granting the anti-SLAPP motion, and the appellate decision affirming same.

filed, or otherwise was involved in pleadings, motions, or discovery; or (3) paid any legal fees on behalf of Martin.

In his declaration Gentry stated he and Berger Kahn represented Martin and Footprints in Hoover v. Martin. He performed most of the work. Defendant was not involved in representing Martin or Footprints. Martin and Footprints were charged for the work and invoices were sent to them. All fees that were paid came from either Martin or Footprints. No payments were made, either directly or indirectly, by defendant or anyone acting on defendant's behalf.

Martin stated in her declaration that in Hoover v. Martin, defendant gave her no legal advice and she did not discuss the matter with him. Berger Kahn sent her invoices for the work performed. Although there is still a balance due, whatever was paid was from Martin or Footprints, via checks she personally signed. Defendant paid no fees, either directly or indirectly, on behalf of Footprints or Martin.

Two days prior to the hearing on the motion for summary judgment, plaintiff filed an application to have the dates for trial and the summary judgment hearing continued so he could conduct discovery, claiming there were "several key documents" (undescribed), he required to prove his case. The court continued the summary judgment hearing to March and trial until April 2013.

In February 2013, plaintiff filed another application to continue those dates, again to engage in discovery, i.e., take Martin's deposition. The court granted the application and continued the hearing and trial to May and June, respectively.

Martin's deposition was delayed because after she was served with a deposition subpoena, she filed a motion for protective order. Martin stated she was afraid to be near plaintiff because he had threatened to kill her and her son and she knew he owned guns. The court granted the protective order in part, allowing the deposition but ordering it be held at the courthouse, be limited to four hours, and have security present.

Plaintiff primarily sought information from Martin as to whether she had paid Berger Kahn any attorney fees. She testified she was “sure” the firm had sent her bills but she did not know what month or when was the last time she had received a bill. She testified she paid some money although she had no memory of actually writing a check, pointing out it was six, almost seven years later. She also testified she still owed the firm money, although at that moment she did not know how much. Plaintiff’s subsequent motion to compel further testimony was denied.

Plaintiff had served several deposition subpoenas duces tecum on Berger Kahn seeking accounting records related to Gentry’s representation of Martin in Hoover v. Martin and of defendant in the Arbitration. In one plaintiff sought “[a]ll accounting records, including account receivable and billing system records,” related to those two actions. Defendant filed a motion for protective order based on the attorney-client privilege, work product protection, right to privacy, and relevance.

After the trial court denied defendant’s motion to quash the subpoena, this court issued an opinion reversing and ordering the trial court to grant the motion, holding plaintiff did not produce any evidence to rebut the showing of attorney-client privilege. (*Walley v. Superior Court* (July 24, 2013, G048340) [nonpub. opn.].)

In April plaintiff filed a third application for a one-week extension to file his opposition to the motion for summary judgment, in part because he was waiting for the billing records from Berger Kahn. The court granted the request.

Less than one week later, plaintiff filed another application for additional time to file his opposition. This was due to the writ petition defendant had filed seeking to overturn the order for Berger Kahn to produce the billing records. Plaintiff asked he not be required to file the opposition until two weeks after he received the documents. The court granted the motion and continued trial to October 2013. The summary judgment motion was reset for September.

In August, defendant filed his reply in support of the summary judgment motion, noting plaintiff had neither filed an opposition nor asked for a continuance of the hearing. A few days before the hearing plaintiff filed a late opposition to the motion.

Defendant argued Berger Kahn's business records would show who had paid Martin's fees. Plaintiff asked for another continuance, stating that even though the court of appeal had ordered his subpoena of Berger Kahn's records quashed, it made findings only as to the documents in the Arbitration between plaintiff and defendant and did not rule as to records relating to Hoover v. Martin. Plaintiff also speculated the court of appeal ruling suggested a more circumscribed subpoena might pass muster.

The court granted the request, continuing the summary judgment hearing and trial to November and December 2013, respectively.

Plaintiff then served two subpoenas duces tecum on Berger Kahn, seeking documents as to Hoover v. Martin and the Arbitration. Berger Kahn filed a motion to quash the subpoenas leading plaintiff to file another request to continue the summary judgment hearing and trial. The court granted the request, continuing the summary judgment hearing until January 2014 and the trial to March 2014.

Plaintiff filed a motion to enforce the subpoena for the records in Hoover v. Martin. Berger Kahn stipulated to produce records with confidential information redacted. It produced invoices to Martin and Footprints, cancelled checks from Martin and Footprints, and the trust account ledger showing deposits and disbursements. The custodian of the records of Berger Kahn executed a declaration stating the produced documents were in response to plaintiff's subpoena and contained all invoices sent to Martin and Footprints, all checks received in payment, and the trust account ledger relating to the case.

Thereafter, plaintiff filed his supplemental opposition to the motion for summary judgment. In his declaration, while acknowledging the documents Berger Kahn had produced, plaintiff sought a court order for additional documents. He claimed that

because Gentry represented defendant in the Arbitration, he needed to review the invoices to and checks from defendant to see if defendant overpaid or his payments were not credited to his account. That way, those payments could be traced to Martin's account. He sought an order for Berger Kahn to produce an unredacted document showing Martin's balance and defendant's balance.

After argument at the hearing and before ruling, the court stated: "You [plaintiff's counsel] used a word that I had written down that this is *speculation*, and it is. I cannot let this case go to trial on what really is not evidence but just speculation. I suppose, in a way, it is understandable speculation. [Plaintiff] is -- I guess he's a jilted boyfriend; he's a disgruntled client; he's a lot of things that make him unhappy and suspicious. And he sees ghosts, but that's all he has presented in opposition, are [sic] just specters, shadows and speculation. [¶] . . . [I]t has come to the point that he sees an evil in the fact that two lawyers here in Orange County happen to recognize each other when they pass on the street, or might refer a case one to the other. When, in fact, the circumstances here, apparently, were quite benign in the sense that the referral was a tripartite referral with three names given or maybe more. And it happens that one of those names was chosen. [¶] It's really just guess work on [plaintiff's] part. He has, I think, benefitted. He might not agree, but I think he's benefited from uncommon and unexpected patience by this court and tolerance for the discovery that he has tried to undertake. [¶] . . . [T]here was ultimately some resolution of some of those [discovery] disputes with the result that [plaintiff] has now seen who paid [Martin's] lawyer bills. If they weren't fully paid, that doesn't mean that anyone else paid them. It just means that they weren't paid. Beyond that, its guessing, and I cannot let this matter go to trial."

The judgment in favor of defendant stated he had "presented sufficient proof that he did not take a position adverse or antagonistic to plaintiff Hoover in the 'Hoover v Martin' litigation, and did not breach any fiduciary duty owed to plaintiff Hoover with respect to that litigation." Thus, the burden of proof "shifted to plaintiff

Hoover to present sufficient evidence of a triable issue of material fact.” The evidence plaintiff presented did not create a triable issue of material fact.

## **DISCUSSION**

### *1. Principles of Summary Judgment*

Code of Civil Procedure section 437c, subdivision (c) (all further statutory references are to this code), declares “summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” A defendant may bring a motion on the ground there is a complete defense to the action or the plaintiff cannot prove one of the required elements of the case. (§ 437c, subds. (o)(2),(p).) If he meets his burden to show a complete defense, the burden shifts to plaintiff to produce evidence showing a triable issue of material fact. (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144.)

“There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted.) “[A] party ‘ . . . must produce admissible evidence raising a triable issue of fact. [Citation.]’ [Citation.]” (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.*, *supra*, 199 Cal.App.4th at pp. 1144-1145.) We review a summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.*, at p. 860.)

### *2. Breach of Fiduciary Duty*

“To establish a cause of action for breach of fiduciary duty, a plaintiff must demonstrate the existence of a fiduciary relationship, breach of that duty and damages.” (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1509.) A lawyer owes duties of undivided loyalty and confidentiality. (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1102.) These duties continue after the attorney-client relationship is terminated. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

In support of the motion, defendant submitted three declarations, his, Gentry's and Martin's, and plaintiff's deposition testimony to demonstrate he had not breached a fiduciary duty to plaintiff. That evidence showed defendant had nothing to do with litigating Martin's cross-complaint against plaintiff in Hoover v. Martin, including paying Martin's attorney fees. This was sufficient to satisfy defendant's initial burden to show the absence of any triable issue of material fact and his right to judgment as a matter of law. Thus, it fell to defendant to present admissible evidence of a triable issue of material fact. Plaintiff failed to do so.

Plaintiff's theory of the case is defendant acted as "the man behind the scenes" or the "driving force" on behalf of Martin in Hoover v. Martin, in breach of his fiduciary duty. Plaintiff contends defendant paid at least some of Martin's fees in that litigation or arranged to have Berger Kahn represent Martin without cost.

He concedes defendant's referral of Gentry to Martin alone "is not necessarily" a breach, but claims it helped defendant in defendant's own litigation with plaintiff "by allowing Gentry, [defendant's] friend, to battle Hoover on all fronts." He also claims the referral gave defendant "some control" over the events in Hoover v. Martin, so defendant "could continue to protect his own interest." Further, defendant's referral gave Martin "a huge advantage over [plaintiff]" because Gentry provided free legal services to Martin due to Gentry's friendship with defendant.

The problem with these claims is that they are just that—claims. There is no evidence raising a material issue of fact to support them. Rather, as the court noted, plaintiff has presented only speculation and conjecture. His reliance on his "gut feel" is directly contradicted by specific facts presented by defendant.

Plaintiff asks us to draw several inferences merely from defendant's referral of Martin to Gentry. But when inferences are the basis of an opposition, the inferences "must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork." (*Waschek v. Department of Motor*

*Vehicles* (1997) 59 Cal.App.4th 640, 647.) Where a plaintiff relies on circumstantial evidence to defeat a motion for summary judgment, it is insufficient to show “the inferences [h]e draws from those circumstances are *consistent* with [his] theory.” (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472,483.) “We will not . . . draw inferences from thin air.” (*Ibid.*)

Nor are we persuaded by plaintiff’s claim Gentry “over aggressively litigated” both *Hoover v. Martin* and the Arbitration. That the Arbitration took 21 sessions and that plaintiff prevailed on Martin’s cross-complaint in *Hoover v. Martin* are irrelevant to any claim of breach of fiduciary duty by defendant.

Moreover, the fact Martin paid limited fees<sup>5</sup> or no fees to Berger Kahn or that Berger Kahn allegedly made no collection attempts does not bear on plaintiff’s breach of fiduciary duty claim against defendant. There is not a shred of evidence nor an inference to be drawn that if Berger Kahn had sued Martin, it would likely had led to an action against defendant, who was allegedly paying Martin’s fees. As the court noted, that Martin might not have paid all her fees means nothing more than that. It is not a reasonable inference that defendant paid them.

In his separate statement of facts, plaintiff argued the “self-serving declarations” of defendant, Martin, and Gentry where they denied defendant paid Martin’s fees should not be given any weight but a trier of fact should make a credibility decision. This does not persuade.

““A self-serving declaration, of course, is an extrajudicial statement made by a person for his own benefit or in his own interests.”” (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1049.) “Modern courts have recognized that all evidence proffered by

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<sup>5</sup> Plaintiff claims the amount Martin paid is close to the amount she received from the settlement in the Landlord Suit. He complains that was money defendant wrongfully paid to Martin when he should have paid it to plaintiff. But that amount was awarded to plaintiff in the Arbitration against defendant. It has no bearing on the allegations in this case.

a party is intended to be self-serving in the sense of supporting the party's position, and it cannot be discounted on that basis." (*Id.* at p. 1050.)

In addition, Martin's, Gentry's and defendant's declarations contain evidence from three different sources, two of whom are not parties. Thus, it is not just defendant's declaration on which the court could rely. Further, the three declarations were not the only evidence supporting defendant's position. The billing and payment records from Berger Kahn showed defendant made no payments. Thus it was proper for the court to consider the declarations defendant submitted in support of his motion and plaintiff was required to produce countervailing evidence.

Plaintiff argues defendant filed a "no evidence" motion, that is, defendant relied on a theory plaintiff could not prevail because there was no evidence to support plaintiff's claims. He contends defendant must negate all theories of liability evidenced by the pleadings. He maintains defendant has not done so because he never propounded an interrogatory asking for all of plaintiff's evidence. This last claim is frivolous.

There is no case law requiring this type of interrogatory or any other to be propounded. It is one way to flush out all of a party's evidence, but it is by no means the only way. And defendant has negated all theories of liability. The complaint alleges one cause of action—breach of fiduciary duty. Plaintiff's claimed breaches, set out above, have either been negated or, as the court noted, are speculation and conjecture. Plaintiff proffers no evidence and there is no way he could obtain any because the events he asserts never happened. Defendant met his burden. Plaintiff did not.

Plaintiff did not produce sufficient evidence of material issues of fact that would defeat the motion. Therefore, the court properly denied the motion.

### *3. Motion for Continuance*

Relying on section 437c, subdivision (h), plaintiff claims the court erred by failing to continue the hearing so he could conduct additional discovery. We disagree.

Section 437c, subdivision (h) provides that if the declarations filed in opposition to the motion for summary judgment show that facts “essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion[ and] order a continuance to permit . . . discovery to be had . . . .”

To obtain a continuance plaintiff must make “a good faith showing that an extension of time is needed to obtain facts essential to justify opposition to the motion.” (*Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 655.) Good faith is demonstrated if plaintiff shows ““(1) the facts to be obtained are essential to opposing the motion; (2) *there is reason to believe such facts may exist*; and (3) the reasons why additional time is needed to obtain these facts.””” (*Id.* at p. 656, italics added.)

Plaintiff claims that, under section 437c, subdivision (h), a continuance is ““virtually mandated”” so long as he has made the required showing. As he acknowledges, to merit a continuance he must make a sufficient showing and he has not.

As the trial court noted, plaintiff had several opportunities to obtain discovery. As recounted above he was given multiple continuances to do so, totaling 13 months. However, the documents and answers provided did not support his theory of the case. Martin, Gentry, and plaintiff all testified that neither defendant nor his firm made any payments to Berger Kahn on behalf of Martin, in any way, either directly or indirectly.

In response to plaintiff’s subpoena duces tecum Berger Kahn produced all the documents it had showing billings, payments, and credits regarding Martin’s case. None of those documents substantiate plaintiff’s theory defendant paid some or all of Martin’s attorney fees.

Plaintiff’s conclusion Berger Kahn did not provide all documents requested is not evidence and it is not supported by evidence. His conjecture there are additional documents is only that, conjecture.

Now plaintiff hypothesizes Berger Kahn's billing records concerning its representation of defendant might show some of defendant's payments could have been directed toward Martin's case. But based on the responses and documents already produced there is nothing to suggest this is true. Rather, it is pure speculation and wishful thinking on plaintiff's part. Further, without deciding whether these documents might be privileged or otherwise protected from discovery, we note that plaintiff has been denied other discovery on privilege and other grounds.

Additionally, information on Martin's balance due to Berger Kahn is not relevant to whether defendant paid any of her bills. It does not mean the firm represented Martin without charge as a favor to defendant. Finally, as the court noted, the fact a balance is due just means invoices were not paid. "Beyond that, it's guessing." The court did not abuse its discretion in denying plaintiff's motion for a continuance. (*Jade Fashion & Co., Inc. v. Harkham Industries, Inc.*, *supra*, 229 Cal.App.4th at p. 657.)

### **DISPOSITION**

The judgment is affirmed. Defendant is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.